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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

NO. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased, Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Questions Presented by petitioner (Pet. 2) do not challenge the ruling below that there was serious error in the instructions on express warranty and on assumption of risk. Though petitioner in its argument takes issue with these rulings (Pet. 15-20), since they are not here raised as error they must be assumed to have been correct. It is therefore petitioner's position that, though the verdict in its favor came from a jury which had been erroneously instructed as to the law, nevertheless the integrity of jury trial and the inexorable language of Rule 51 require that such a verdict must stand. The demand of this litigant for its pound of flesh is hardly one of those "special and important rea-

sons" which, under Rule 19 of this Court, alone justify the grant of certiorari.

The action of the Third Circuit in this case did not emasculate Rule 51, as petitioner suggests. (Pet. 15). It applied the rule in precisely the spirit for which this Court has called.

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

*Hormel v. Helvering,* 312 U.S. 552, 557 (1941).

The Court expressed a similar view in the passage from *United States v. Atkinson,* 297 U.S. 157, 160 (1936), quoted in the petition. (Pet. 12). Petitioner would distinguish *Atkinson,* which clearly recognizes the possibility of reversal for plain error in a civil case, on the ground that it antedates adoption of Rule 51. Petitioner ignores the fact that this very passage from *Atkinson* was quoted and relied on for decision by this Court in *Silber v. United States,* 370 U.S. 717, 718 (1962).

Petitioner says that if there is a plain error exception to Rule 51 — as this Court has indicated and the courts of appeals repeatedly have held — it is not as broad as it was understood to be by the court below. (Pet. 15). But a leading commentator formulates the

exception in these terms: "* * * the appellate court may in its discretion consider grounds of error in spite of a failure to object below where it is apparent on the face of the record that a miscarriage of justice may occur." 5 Moore, Federal Practice ¶ 51.04, pp. 2503-4 (2d ed. 1964). This is the exact formulation on which the court below relied. (A-11)

The conflicts and confusion which petitioner professes to find in the decisions of the courts of appeals on this question are illusory. It is true that judges and legal writers have used varying terminology in describing the power of the appellate court where plain error has occurred, but petitioner shows no conflicting holdings among the courts of appeals. It instances no case in which a court has affirmed, because of the absence of objection in the trial court, in the face of instructions as erroneous as those given here. Verbal formulations are a matter of style and of taste. Behind the words, all recognize that reversals in the absence of objection should not be common. When holdings are distinguished from dicta, it is apparent that this power has been exercised sparingly and with restraint by the appellate courts. See 2B Barron & Holtzoff, Federal Practice and Procedure § 1106 n. 66.1 (Wright ed. 1961). This has been the policy of the Third Circuit, as of the others. The question whether this particular case was one of those rare cases in which the power should be exercised is hardly the kind of question which merits review here.

Finally, if there were confusion and conflict as to the proper understanding of Rule 51 — and respondent believes there is none — it could not effectively be ended

by a decision here, which would of necessity be confined to the facts of this particular litigation. The cure for this non-existent disease would more appropriately come through the exercise by the Court of its power to amend the rules, in which the Court would have the benefit of recommendations from the Advisory Committee on Civil Rules, the Advisory Committee on Appellate Rules, and the Judicial Conference of the United States. These distinguished bodies, which are charged with continuous examination of the various sets of procedural rules, can study the entire question, obtain the views of the profession, and provide the Court with a broader perspective on the problem than a particular case permits.

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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